PUBLIC PROSECUTOR v. HAJI KASSIM

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) May 19, 1971]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1970]

Evidence — Medical witness — Incriminating statement made to psychiatrist or medical officer — Whether privileged — Evidence Ordinance, 1950, ss. 5, 24, 25, 26 and 126.

Constitutional Law — Fundamental liberty — Invasion of privacy — Federal Constitution, art. 5(1).

Criminal Law and Procedure — Point reserved on trial for Federal Court — Courts of Judicature Act, 1964, s.65(1).

The following questions were referred to the Federal Court under the provision of section 65(1) of the Courts of Judicature Act, 1964:

(1) Can an incriminating statement made by an accused to a psychiatrist or a medical officer be admissible against the accused and especially when it springs from the existence of the highest degree of confidence between the psychiatrist and the patient? Does this special relationship affect its admissibility?

(2) If such an incriminating statement is admissible, could there be circumstances which would render it inadmissible?

(3) Does section 24 of the Evidence Ordinance apply where a patient makes a statement to a psychiatrist in a mental hospital during the course of a normal routine examination of the patient?

Held: (1) the privilege of excluding professional confidence in section 126 of the Evidence Ordinance does not protect professional disclosures made to clergymen or doctors. The answer to the first question, therefore, must be in favour of admissibility;

(2) as to the second question the only point of substance is where the incriminating statement is in the nature of confessions. Such a statement is not admissible if it is excluded by any of sections 24, 25 and 26 of the Evidence Ordinance;

(3) the answer to the third question is that section 24 of the Evidence Ordinance applied. The psychiatrist in a mental hospital is a person in authority in the institution where he conducts a routine examination of a patient. Hence any inducement, threat or promise proceeding from him, having reference to the charge against the patient, must render any self-incriminatory statement by the patient inadmissible.

Observations on the examination of medical witnesses where the defence of insanity is raised.

Cases referred to:-

(1) *Kuruma* v. *R.* [1955] 2 W.L.R. 223, 226-7.

(2) *Noor Mohamed* v. *R.* [1949] A.C. 182, 192.

FEDERAL COURT.

Gunn Chit Tuan (Deputy Public Prosecutor) for the Public Prosecutor.

V. K. Palasuntharam as *amicus curiae.*

Ong C.J. (Malaya): Arising out of a murder trial in the High Court at Muar the learned trial judge felt constrained to refer the following questions to this court under the provisions of section 65(1) of the Courts of Judicature Act 1964, namely —

(1) Can an incriminating statement made by an accused to a psychiatrist or a medical officer be admissible against the accused and especially when it springs from the existence of the highest degree of confidence between the psychiatrist and the patient? Does this special relationship affect its admissibility?

(2) If such an incriminating statement is admissible, could there be circumstances which would render it inadmissible?

(3) Does section 24 of the Evidence Ordinance apply where a patient makes a statement to a psychiatrist in a mental hospital during the course of a normal routine examination of the patient?

The accused was an Imam in Segamat. On the morning of March 11, 1970 he struck his 17 year-old daughter a heavy blow with a parang on the back of the neck which killed her instantly. There was evidence that he had been suffering from acute depression for some time. Medical evidence was called by the defence in an attempt to prove insanity and one of the witnesses was Dr. V. G. Gune, the consultant psychiatrist at Tampoi Mental Hospital. He was asked by the Deputy Public Prosecutor a question in cross-examination which led to this answer: "He said he then took a parang and hacked her once at the back of the neck."

The judge overruled an objection, under section 26 of the Evidence Ordinance, 1950, to its admissibility, but having subsequently referred to certain American text-books on evidence, particularly on the subject of invasion of privacy, felt (if we may so put it) some uneasiness about infringement or erosion of fundamental liberties, as declared in article 5(1) of the Constitution, that "no person shall be deprived of his life or personal liberty save in accordance with law". This was what, we think, prompted the first question.

In all our courts the Evidence Ordinance provides a complete code on the subject. If any fact is sought to be introduced in evidence it must be relevant and admissible under section 5 or one of the other sections following. On the other hand, whatever is logically probative is not necessarily admissible in evidence, unless it is so under the Ordinance. The answer to the first question, therefore, must be sought within the four walls of the Evidence Ordinance. If any fact is admissible under our code, then it must be receivable unless it is excluded by some other provision therein as, for instance, sections 24 to 26. In this light must be read the judgment of the Privy Council in *Kuruma* v. *The Queen*[1] where Lord Goddard C.J. said: —

"the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained... There can be no difference in principle for this purpose between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused. This was emphasized in the case before this Board of *Noor Mohamed* v. *The King* and in the recent case in the House of Lords, *Harris* v. *Director of Public Prosecutions.* If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from the defendant by a trick, no doubt the judge might properly rule it out."

How the judicial discretion should be exercised in admitting or rejecting evidence proposed to be adduced is thus set out by Lord du Parcq in *Noor Mohamed* v. *The King*:-[2]

"in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

The only relevant provision in our Evidence Ordinance excluding professional confidences is section 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him and in the course of his employment as such. This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two. This privilege does not protect professional disclosures made to clergymen or doctors: see *Phipson* on Evidence, 10th Edition, para. 587 and commentaries in *Sarkar* on section 126 of the Indian Evidence Act 1872. The answer to the first question, therefore, must be in favour of admissibility.

As to the second question, the only point of substance is where the incriminating statement is in the nature of a confession. The short answer is that such a statement is not admissible if it is excluded by any of sections 24, 25 and 26 of our Evidence Ordinance. It is to be observed that in *Kuruma* v. *The Queen* their Lordships' enunciation of principle is qualified in these terms:—

"It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary, and therefore one obtained by threats or promises held out by a person in authority is not to be admitted."

Finally, in answer to the third question, we are of opinion that section 24 of the Evidence Ordinance clearly applies. The psychiatrist in a mental hospital obviously is a person in authority in the institution where he conducts routine examination of a patient. Hence any inducement, threat or promise proceeding from him, having reference to the charge against the patient, must render any self-incriminatory statement by the patient inadmissible.

Before concluding we should perhaps add a few words on the examination of medical witnesses where the defence of insanity is raised. It is almost invariably the case that the doing of the criminal act is provable by extraneous evidence, so that proof of this ingredient in the charge needs no reinforcement whatever by any such witness. His examination should be directed only to ascertain the accused's state of mind at the time of commission of the offence and not for any other subsidiary purpose. Where, however, in the rarest of cases, the only proof of commission of the offence by the accused must be sought in an admission to the medical witness, we are of opinion that it must clearly be proved, as a condition precedent, that the accused was sane, before evidence connecting the accused with the offence is admissible. It goes without saying that such evidence may still be excluded under the provisions of section 24 of the Evidence Ordinance.

Order accordingly.

KARUPPIAH CHETTIAR v. SUBRAMANIAM

[F.C. (Ong C.J. (Malaya) Gill & Aii F.JJ.) May 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 108 of 1970]

Land Law — Sale of land — Issue document of title not delivered — Unregistered transfer — Transferee entering caveat to protect interest — Prohibitory ordr issued against interest in the land by judgment creditor — Application to set aside prohibitory order — Priorities — Whether equitable principles applicable to National Land Code — National Land Code, ss. 5, 206, 322 327, 334, 337.

Practice and Procedure — Prohibitory Order — Issue of — R.S.C. 1957, O. 43 r. 2 — Judgment creditor — Sale of land — R.S.C. 1957, O. 43 r. 11.

On November 8, 1968, one Mohamed Sharjudin sold all his interest of an undivided 2/6 share in a certain piece of land in the mukim of Ulu Kinta, to the respondent. Nothwithstanding the sale, Mohamed Sharjudin remained registered as the proprietor of the said land because he was unable to deliver to the respondent the issue document of title to enable registration of the memorandum of transfer which was duly executed and stamped on the date of the sale. However, on November 13, 1968, the respondent applied for and obtained entry of a private caveat on the register document of title to the land in order to protect his interest.

The appellant was one of the executors of the estate of one Suppiah Chettyar deceased. It appeared that Mohamed Sharjudin had deposited the issue document of title as security for loans granted to him by the said deceased who apparently had taken no steps to lodge a lien-holder's caveat against the land. On March 3, 1969, Mohamed Sharjudin executed a second memorandum of transfer in respect of the same land in favour of the executors of the deceased's estate. It was on inspection of the register document of title that the executors came to know about the private caveat lodged by the respondent.

On April 22, 1969, a prohibitory order was issued against the said interest in the land in execution proceedings at the instance of the appellant who had obtained judgment against Mohamed Sharjudin in Civil Suit No. 668 of 1968, on a claim for the recovery of money lent. The prohibitory order was said to have been subsequently entered on the register document of title under the provisions of the National Land Code. On May 9, 1969, the respondent intervened in the proceedings by taking out a summons in chambers for an order that the prohibitory order be set aside on the ground that the judgment debtor had no beneficial interest in the said undivided share in the land.

At the hearing of the summons in chambers, counsel for the parties informed the court that by consent the issue to be tried was whether the unregistered transfer dated November 8, 1968 and supported by the entry of caveat on November 13, 1968, affected the prohibitory order obtained by the appellant on April 22, 1969, and registered subsequently, and the rights of the attaching creditor. The learned trial judge made the order asked for, against which the appeal arose. The appellant contended that (a) the learned judge was wrong in holding the prohibitory order to be of no effect against the caveat; (b) the learned judge erred in holding that a caveat protected land from attachment in execution of a court order; and (c) the intervenor only had a right *in personam* which could not prevent attachment and sale of the land in question.